No. 506

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BEN FLORMAN,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Ben Florman, prays that a writ of certiorari be issued to review the decision of the Appellate Court of Illinois, First District, affirming a conviction of burglary in the Circuit Court of Cook County, Illinois. Petitioner was sentenced to a year and a day in the penitentiary (A. 28).[1]

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[1] "A" refers to the Abstract of Record as filed in the Appellate Court of Illinois in case No. 51104. The abstract is found in the record as certified by the Clerk of the Supreme Court in Case No. 40444.

OPINION BELOW

The Opinion of the Illinois Appellate Court, First District is reported in 77 Ill. App.2d 158, 222 N.E.2d 191, 1966, and is reprinted herein as Appendix A.

The Supreme Court of Illinois denied, without opinion, a petition for leave to appeal from the Appellate Court of Illinois, on March 28, 1967.

JURISDICTION OF THIS COURT

The date of judgment sought to be reviewed was entered on March 28, 1967 when the petition for leave to appeal in the Supreme Court of Illinois was denied. This petition for a writ of certiorari is filed within 90 days from said denial.

The jurisdiction of this court is invoked under Title 28, U.S. Code, Section 1257(3) and Rule 22 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

In determining guilt or innocence, may a trial judge consider evidence which was not admitted as against the petitioner?

Absent such impermissibly considered evidence, was the totality of evidence sufficient to justify the conviction of burglary?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

Petitioner was found guilty of the crime of burglary and was sentenced to a year and a day in the Illinois Penitentiary (A. 28). The evidence showed that one Mary Fudula left her apartment in Chicago, Illinois, at about 6:00 or 6:30 on the evening of September 5, 1964 with one Joseph Sender who had painted her apartment on three previous occasions. They returned about 10:30 or 11:00 P.M. to find the furs and jewelry missing (A. 6). About a month later, she obtained keys from Mrs. Shirley Sender, wife of Joseph Sender. The keys fitted lockers at a railroad station and at an elevated station. Mrs. Fudula recovered her property (A. 7). Joseph Sender testified that on October 15, 1964, he talked with petitioner, at which time he stated that his (Sender's) life was threatened and asked petitioner if he knew anyone who had any connection with the burglary and further told petitioner that he wanted the stuff given back to Mrs. Fudula. Petitioner said he had no information, but if he obtained any, he would try to get the merchandise back for Mr. Sender. On October 16, 1964, petitioner gave Mr. Sender some packages which were put in the aforesaid lockers (A. 12-13).

One, John J. Gallagher, Chief Investigator for the Illinois Crime Commission testified that on October 14, 1964, he received two telephone calls. The substance of his testimony was not admitted as to petitioner but related solely and exclusively to a co-defendant, one Reeder, indicted with petitioner. Gallagher testified he received a phone call from Reeder. He conveyed the fact to Reeder that if something was not done about the return of the stolen goods, he, Reeder, would be thrown in the river (A. 14-15).

REASONS FOR GRANTING THE WRIT

The Appellate Court of Illinois considered seriously the testimony of Gallagher not admitted into evidence against the petitioner. The Illinois Court made the same error the trial judge made in *United States* v. *Turnipseed,* 7 Cir. 272 F.2d 106. There, the Seventh Circuit reversed a conviction because the trial court considered against the defendant evidence which, during the trial, was excluded as against that particular defendant. In reversing in *Turnipseed,* the court said, p. 107:

> "Some of Turnipseed's co-defendants made confessions. These confessions were not admitted in evidence as against Turnipseed. Nevertheless, the learned trial judge considered them as evidence against this defendant. The judge stated Turnipseed talked about checks during the time he drove the automobile. The only evidence of any such statement was in a co-defendant's confession which is not in this record so far as Turnipseed is concerned."

The Appellate Court of Illinois erred demonstrably in this connection, and, accordingly, petitioner's right to a fair trial in accordance with due process of law was violated.

CONCLUSION

Wherefore, petitioner prays that a Writ of Certiorari may be issued to review the findings and judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner.

APPENDIX "A"

OPINION OF THE APPELLATE COURT

MR. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court.

The defendant appeals from a conviction of burglary by the court sitting without a jury. He was sentenced to the penitentiary for a term of one year to one year and a day.

The defendant contends that the court erred in finding the defendant guilty of burglary, because the evidence did not show that he entered a building, or participated in a burglary or conspired with those who did, and that the evidence did not show that the defendant was at any time in exclusive possession of the stolen goods.

The defendant, together with Abe Reeder and Joseph Sender, was indicted for the crime of burglary. The indictment charged them with knowingly entering into the dwelling house of Mary Fudala at 4250 North Marine Drive in Chicago, without authority and with intent to commit the crime of theft, contrary to section 19-1 of the Criminal Code (Ill. Rev. Stat. 1963, chap. 38, par. 19-1). The defendant and Abe Reeder were tried together and were represented by separate counsel. Reeder was acquitted, and the defendant Florman was found guilty of the charge of burglary.

Mary Fudala, the victim of the burglary, testified that on September 5, 1964, she lived in apartment 2101 at 4250 Marine Drive. She knew Joseph Sender, whom she had hired to paint her apartment on three occasions. At about 6:00 or 6:30 that evening she went with Joseph Sender and

her son to a restaurant. They returned about 10:30 or 11:00 o'clock P.M. She further testified that she had jewelry, valued at about $25,000.00, exposed in trays on the dresser, a chinchilla wrap and a mink jacket in the apartment when she left for dinner. Upon her return the trays with the jewelry, plus the fur wrap and jacket, were missing. She further testified that on October 15, 1964, she saw Joseph Sender and his wife, Shirley, on separate occasions. She had talked to Mrs. Sender several times that day on the telephone. On October 16, 1964, at about 9:00 A.M. she met Shirley Sender in Sender's apartment. Later that same day, at 8:00 P.M., they again met at the Lincoln Village, at which time Shirley gave Mrs. Fudala a key. The next morning Mrs. Fudula went to the Northwestern Station to a box where Mrs. Sender said she would find her things. She opened the box with the key and took out a plastic bag which she had purchased. The bag was stuffed with her furs and about half of the stolen jewelry. On October 19, 1964, Mrs. Sender gave Mrs. Fudala another key at the Wilson Avenue Station. Mrs. Sender took Mrs. Fudala to a locker and Mrs. Fudala opened the locker. There she found "something similar to a cigar box in it." Nearly all of the balance of the jewelry was in the box.

Margaret Davis, a waitress at the Imperial Towers on Marine Drive, testified that while at work on September 25, 1964, in the morning, she saw Joseph Sender and the defendant Florman and Reeder sitting in a booth. She served them four coffees while they were in the restaurant that morning. She did not hear what they were saying but they remained in the restaurant for about an hour and a half talking. She testified she did not notice what anyone was wearing but she did identify Reeder as being present with Florman and Sender. She did not know the names of the people who were charged in this case excepting that of Sender.

Joseph Sender was called as a witness for the People and testified that he had been previously convicted in this matter. He testified that on October 15, 1964, he saw the defendant, Ben Florman, in the Imperial Towers restaurant; that he talked to him about painters. He also had a telephone conversation with the defendant on October 15, 1964, at which time he told Florman that his, Sender's, life was threatened and he told the defendant Florman that if he knew anybody who had any connection with the burglary he wanted "that stuff" given back to Mrs. Fudala. He also testified that the defendant Florman said he didn't know. "But if he has any information, if he has it, he'll try to get it back for me." On the afternoon of October 16, 1964, Sender met the defendant at Kimball and Bryn Mawr Avenues. He further testified that the defendant brought a package and that the defendant said, "This is it." Sender went to the Northwestern Station at Canal and Washington and put the package in a box and then told his wife, "Please, get a hold of Mrs. Fudala. Here's the stuff back." He gave the key to the locker to his wife.

Shirley Sender, the wife of Joseph Sender, testified that on October 16, 1964, her husband gave her a key. She then got in touch with Mrs. Fudala and turned the key over to her.

Abe Reeder, was called as a witness in his own behalf. He testified that he did not burglarize the Fudala apartment and did not participate in the burglary of that apartment. He also stated that he was a partner of the defendant Florman in the B & F Construction Company, and that Joseph Sender is his brother-in-law. Shirley Sender is his sister. He also testified as follows:

"Q. Did you overhear a conversation by Mr. Florman that he had the goods?

A. Yes.

Q. When was this?
A. Sometime in October, the early part of October.
Q. During the conversation—who did Mr. Florman have the conversation with?
A. I don't know; probably a conversation came in. Our desks are very close together.
Q. You heard him talking on the phone?
A. Yes.
Q. What did you hear him say?
A. Something about jewelry. I couldn't be specific, because first of all, it wasn't in English.
Q. Well, was it in Hebrew?
A. No. It was in Yiddish.
Q. Did you understand Yiddish?
A. Very little.
Q. But you did understand enough to know that it was about jewelry, is that right?
A. I caught one or two words.
Q. Now, how did you know it was about the jewelry that was taken from Mary Fudala's apartment?
A. *I didn't know.*"

Reeder further testified that on the afternoon of October 15, 1964, he talked to the defendant Florman at his place of business about going to get this jewelry back. He told the defendant that he had met a man whom he thought was a hoodlum, and that he had threatened Reeder. This alleged hoodlum had also threatened Florman and said that if the defendant Florman had any jewelry he wanted it back. Florman said he didn't know what they were talking about.

John J. Gallagher, Chief Investigator for the Illinois Crime Commission, testified that on October 14, 1964, he received two telephone calls. The first one was from the informer and the second was from the informer and Mr. Reeder. During the time he saw the defendant Reeder and Ferdman, who was the informer, he impersonated a

syndicate hoodlum known as Mr. "J." During his conversation with Abe Reeder he conveyed to him the fact that if something wasn't done about the return of the stolen goods he, Reeder, would be thrown in the river. He further said, "In effect, he would be killed."

During this time another representative of the Illinois Crime Commission, Mr. Walker, also impersonated a syndicate hoodlum.

The defendant argues that the evidence against him is only that Sender met the defendant, who gave Sender a package; that Sender put the package in a locker and told his wife to tell Mrs. Fudala that "the stuff is back." The locker was at the Northwestern Station and the key was given to Sender's wife, who is Reeder's sister. She, in turn, give the key to Mrs. Fudala.

The State argues that the recent, exclusive and unexplained possession of stolen property gives rise to an inference of guilt sufficient to sustain a conviction of burglary. *People* v. *Owens,* 23 Ill. 2d 534, 179 N.E.2d 630; *People* v. *Pride,* 16 Ill. 2d 82, 156 N.E.2d 551; *People* v. *Malin,* 372 Ill. 422, 24 N.E.2d 349.

In *People* v. *Bennett,* 3 Ill. 2d 357, 363, 121 N.E. 2d 595, the court said:

> "This court has often announced the rule that the possession of stolen property, the proceeds of a burglary or larceny, soon after the commission of the offense, is evidence of the guilt of the person or persons in whose possession it is found and is sufficient to warrant a conviction *unless such possession is explained* or unless there appears from all the evidence a reasonable doubt of the defendant's guilt." (Emphasis supplied.)

The defendant did not testify in this case, nor is there any evidence in the record which in any way attempts to explain his possession of the stolen goods. The defendant contends that the evidence, at most, shows that he was an accessory after the fact or receiver of stolen goods.

In *People* v. *Francis,* 362 Ill. 247, 199 N.E. 100, the court said that a burglary can seldom be proved by direct evidence of the actual breaking and entry, and that the inference of guilt, in most cases, must necessarily be drawn from other facts satisfactorily established. In that case certain important links in the chain of the People's evidence were supplied by circumstances. In the *Francis* case, *supra,* the defendant testified and attempted to explain his possession to overcome the presumption of guilt, but failed to do so to the satisfaction of the jury.

In the instant case no effort was made to explain defendant's possession of the stolen property.

In *People* v. *Pride, supra,* the court held that no definite time can be fixed as to when, as a matter of law, possession is or is not recent. The defendant was seen before the crime in the company of Sender, who was convicted of the crime. When Sender and Reeder were threatened with death unless the stolen goods were returned, they immediately called Florman. Why would they have immediately called Florman unless they knew that he had the stolen goods? When Florman was told that he also had been threatened, he promptly produced a portion of the stolen goods. We do not believe that the argument of the defendant, to the effect that the positive evidence failed to show that he entered the building and therefore could not be guilty of burglary, is well taken. Under the circumstances and inferences to be drawn, we believe that the State satisfactorily proved a case of burglary against this defendant.

The defendant also argues that under the evidence there is no showing that the defendant was in exclusive possession of stolen goods. However, the evidence positively showed that he did possess the goods, and whether he had sole possession, or whether it was shared, does not affect the inference of guilt. *People* v. *Reynolds,* 27 Ill. 2d 523, 190 N.E.2d 301.

The defendant also argues that there was some confusion as to the use of the words "box," "locker," "package" and "plastic bag." However, from reading the record there can be no question but that the defendant Florman produced a part of the stolen property, and the use of the various words above mentioned could not in any manner change the conclusion reached by the trial judge, that when Florman heard that he was threatened he immediately produced at least a portion of the stolen goods. The remainder of the goods were returned two days later as a result of the same threat against Florman. The evidence that the second key was given to Mrs. Sender by Mrs. Florman was stricken out and cannot be considered in this case, but possession of only a part of the goods does not create a reasonable doubt. *People* v. *Clark,* 30 Ill. 2d 216, 195 N.E.2d 631. The fact that Florman responded so quickly, when he learned that he had been threatened, by returning the stolen goods is, in itself, a most incriminating fact.

Judgment affirmed.

SCHWARTZ and DEMPSEY, *JJ.*, concur.